

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 283 Discretionary Surtax on Documents

SPONSOR(S): Finance & Tax Council; Lopez-Cantera

TIED BILLS: IDEN./SIM. BILLS: SB 1960

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Rows include Military & Local Affairs Policy Committee, Economic Development & Community Affairs Policy Council, Finance & Tax Council, and empty rows.

SUMMARY ANALYSIS

The documentary stamp tax imposes an excise tax on deeds or other documents that convey an interest in Florida real property. The tax rate is 70 cents on each \$100 of consideration for deeds, instruments, or writings whereby lands, tenements, or other real property, or any interest therein, are granted, assigned, transferred, conveyed, or vested in a purchaser, there are also various exemptions and limitations to imposition of the documentary stamp tax. The proceeds of the tax go to the state to fund a variety of state programs and are distributed based on a statutory formula. Miami-Dade County's local discretionary surtax authority was grandfathered in at a rate of 60 cents when the state documentary stamp tax was increased in 1992.

The bill extends the authority for Miami-Dade County to assess a discretionary surtax on documents by extending the surtax sunset from October 1, 2011, to October 1, 2031. The bill further requires financial audits by the Office of Program Policy Analysis and Government Accountability (OPPAGA) of surtax revenues and expenditures, creates reporting requirements, authorizes the adoption of a housing plan every 3 years, limits the amount of surtax revenues which may be used for administrative expenses and specifies percentages of surtax revenues be used to provide homeownership assistance and percentages of surtax revenues to be used for construction, rehabilitation, or purchase of rental housing.

The bill also allows Miami-Dade County, at the option of the county governing board, to create and administer a Housing Choice Assistance Voucher program. It would allow private-sector employers that pay the surtax to apply to the county for housing assistance.

The bill closes a tax avoidance technique by imposing the documentary stamp tax on certain transfers of ownership interests in artificial entities. The tax applies to situations where the owners of real property transfer the property to a wholly-owned artificial entity and subsequently an ownership interest in the artificial entity is transferred for consideration within one year of the initial transfer of the property to the artificial entity. The bill has two separate fiscal issues.

The Revenue Estimating Conference has not determined a fiscal impact for section 3. of the bill dealing with the applicability of the documentary stamp tax to transfers of ownership interests. Staff estimates that the provisions of the bill will result in additional tax revenues being received by the state and Miami-Dade County. On March 27th, 2009 the REC also adopted a fiscal impact related to the extension of the Miami-Dade Surtax. The REC estimated that beginning in FY 2011-12 the extension of this sunset would have a -\$8 million impact on state revenues. The fiscal impact on local government due to the Miami-Dade Discretionary Surtax would be \$9.5 million. In FY 2012-13, the impact on state revenues would grow to -\$14.5 million. The fiscal impact on local government due to the Miami-Dade Discretionary Surtax would be \$17.2 million.

The bill has an effective date of January 1, 2010 and section 3 of the bill applies to transfers of property for which the first transfer to an artificial entity occurs after such date.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES

Overview of Documentary Stamp Tax

The documentary stamp tax imposes an excise tax on deeds or other documents that convey an interest in Florida real property. The tax rate is 70 cents on each \$100 of consideration for deeds, instruments, or writings whereby lands, tenements, or other real property, or any interest therein, are granted, assigned, transferred, conveyed, or vested in a purchaser. Section 201.02(6) - (9), F.S., provide various exemptions and limitations to imposition of the documentary stamp tax. These include:

- Transfers of real property from a nonprofit organization to specified governmental entities;
- Transfers of a marital home between spouses or former spouses as part of an action for dissolution of marriage; and
- Contracts to sell the residence of an employee relocating at his or her employer's direction, when the sales contract is between the employer and the employee.

There is also a limitation applied to certain judicial sales of real property under a foreclosure order. The certificate of title issued by the clerk is subject to the tax; however, the amount of the tax is computed based on the amount of the highest and best bid received at the foreclosure sale.

Documentary stamp tax collections were at a peak in Fiscal Year 2005-06 at \$4.1 billion. In comparison, the forecast for this year is below \$1.1 billion. Positive growth in documentary stamp tax collections is not expected until 2010-11¹.

¹ State of Florida, General Revenue Consensus Estimating Conference, Comparison Report , Documentary Stamp Tax Collections. March 13, 2009.

LOCAL DISCRETIONARY SURTAX

Background and Current Law

Discretionary Surtax on Documents

In 1983, the Legislature enacted chapter 83-220, Laws of Florida, creating s. 125.0167, F.S., to authorize the governing body of certain counties² to levy a discretionary surtax on documents for the purpose of establishing and financing a Home Ownership Assistance Loan Trust Fund. Revenues in the fund were to be used to assist low and moderate income families in the purchase of a home or an apartment. Not less than 50 percent of the funds were to be used to assist low-income families, defined as families whose income did not exceed 80 percent of the median income for the area. The remaining funds could be used to assist families whose income was in excess of 80 percent, but not more than 140 percent, of the median income for the area. The surtax could not exceed the rate of 45 cents per \$100 or fractional part thereof, and could apply only to documents taxable under s. 201.01, F.S., except that no surtax could be imposed on a deed conveying a single family residence, identified as a detached dwelling, a condominium unit, or a unit held through stock ownership or membership representing a proprietary interest in a corporation owning a fee or a leasehold initially in excess of 98 years.

The governing body was directed to adopt an ordinance to levy the discretionary surtax and create the trust fund. The ordinance was required to establish the policies and procedures of the assistance program. The county was directed to deposit revenues from the surtax into the trust fund to be used only for the purchase of a home or an apartment, or the rehabilitation of an existing home or apartment. The surtax could not be used for rent subsidies or grants.

Section 201.031, F.S., was created to establish the discretionary surtax and require counties levying the surtax to submit a financial report (under s. 218.32, F.S.) showing the revenues and expenses of the trust fund. The Department of Revenue was directed to distribute all surtaxes collected within each county to that county's governing authority. The act was scheduled to sunset on October 1, 1993.

In 1984, chapter 84-270, Laws of Florida, changed the name of the Home Ownership Trust Fund to the Housing Assistance Loan Trust Fund with the specified purpose of assisting the financing of construction, rehabilitation, or purchase of housing for low and moderate income families. Funds could be used for first or second mortgages, and buying property to form housing cooperatives. Special consideration was to be given to neighborhood economic development programs of Community Development Corporations. Not more than 50 percent of the revenues collected each year could be used to finance new construction.

In 1989, the Legislature enacted chapter 89-252, Laws of Florida, to provide that the discretionary surtax program will sunset on October 1, 2011. In 1992, the Legislature enacted chapter 92-317, Laws of Florida, to provide that a portion of the discretionary surtax revenues deposited into the Housing Assistance Trust Fund could be deposited into the Home Investment Trust Fund of the county as defined by and created under the requirements of federal law. These set-aside funds are to be used to finance the construction, rehabilitation, or purchase of housing for low-income and moderate-income families and to fund any local matching contributions required under federal law.

The income restrictions and the cap on the discretionary surtax remain unchanged since 1983.

² Counties that meet the definition of "county" in s. 125.001(1), F.S. Currently only Miami-Dade County satisfies this definition.

State Excise Tax on Documents

Chapter 201, F.S., levies a statewide tax on deeds or other documents that convey an interest in Florida real property. The tax rate on such documents is 70 cents per \$100 of consideration paid for the transferred property, except in Miami-Dade County, where the tax rate is 60 cents per \$100 of consideration.³

Section 2 of chapter 92-317, Laws of Florida, enacted a 10 cent increase in the state excise tax rate on deeds referenced above, bringing the tax rate from 60 cents to 70 cents per \$100 of consideration. Section 34 of chapter 92-317 (now codified in 201.0205, F.S.) exempted deeds in Miami-Dade County from the 10 cent tax rate increase, on the condition that the Discretionary Surtax on Documents is levied.

Miami-Dade County Affordable Housing Documentary Surtax Program

The discretionary surtax imposed by Miami-Dade County is contained in section 29-7 of the Code of Miami-Dade County, and is known as the "Metropolitan Dade County Documentary Surtax Ordinance." The ordinance directs that the surtax be assessed at the full rate of 45 cents per \$100 of value on deeds and instruments transferring real property with the exception of documents transferring title to a single-family residence. The ordinance also contains the Miami-Dade County Housing Assistance Loan Trust Fund and establishes the purposes for which surtax revenues may be used.

Miami-Dade County reports that over the past five years, the surtax program has provided more than \$179 million for the construction, rehabilitation, and purchase of housing for low-income and moderate-income families, including \$29 million for 652 homeownership loans.

Local Housing Assistance Plans

Subsection (1) of s. 420.9075, F.S., requires each county or eligible municipality participating in the State Housing Initiatives Partnership (SHIP) program to develop and implement a local housing assistance plan. The plan must be created to provide affordable residential units available to very low, low, and moderate income persons. The plan must also address the special housing needs of the homeless, the elderly, and migrant farm workers, as well as other persons who may need special housing assistance. The plans are also required to include definitions for essential service personnel including teachers and educators, police and fire personnel, health care personnel, skilled building trades personnel, and may include other job categories. Also, local governments are encouraged to develop a strategy within the assistance plan to recruit and retain essential service personnel, and a strategy to address the needs of persons deprived of affordable housing due to the closure of a mobile home park or the conversion of affordable rental units into condominiums.

Subsection (1) of s. 420.9075, F.S., requires that each county or eligible municipality participating in the SHIP program submit an annual report to the Florida Housing Finance Corporation (FHFC) by September 15th of each year. The report must include the following:

- The number of households served by income category, age, family size, race, and special needs.
- The number of units and average cost of producing units under each assistance strategy included in the plan.
- The average area purchase price of single-family units and the amount of rent charged based on unit size.
- The number of mortgages, the average mortgage rate, and the number of defaults by income category.
- A description of the status of implementing each strategy contained in the assistance plan
- Support services available to residents.
- The sales price or value of the housing produced broken down into percentages financed by the local housing distribution, other public funds, and private resources.
- Anything else considered significant by the reporting entity.

³ Sec. 201.02(1), F.S.

Effect of Changes

The bill amends section 3 of chapter 83-220, Laws of Florida, as amended by section 1 of chapter 84-270, Laws of Florida, and section 1 of chapter 89-252, Laws of Florida, to provide that the discretionary surtax on documents for Miami-Dade will be repealed on October 1, 2031, instead of on October 1, 2011.

The bill also amends s. 125.0167, F.S., to require the following:

- No more than 10 percent of the surtax may be used for administrative costs.
- No less than 35 percent of the revenues collected shall be used to provide homeownership assistance for low and moderate income families in purchasing a home as their primary residence.
- No less than 35 percent of the revenues collected shall be used to finance construction, rehabilitation or purchase of rental housing for income limited families or persons.
- Any funds allocated for homeownership assistance or rental housing units that are not committed at the end of the fiscal year will be rolled forward and reallocated 35 percent for homeownership assistance, 35 percent for rental housing units, and 30 percent to either of these two uses in amounts determined by the county.
- Rehabilitation of housing owned by a recipient government is allowed only after an affirmative vote of the county governing body that no other sources of funds are available.
- A county levying the discretionary surtax on documents is given the option to create a housing choice assistance voucher program to be funded from surtax proceeds. Subject to procedures and requirements approved by the county, private-sector employers that pay the surtax may apply to the county for housing assistance allocations to be funded by up to 50% of the surtaxes paid by the employer. Such employers are to, in turn, distribute vouchers to qualified employees. The vouchers must be used for the purchase of a single-family residence within the county and within a 5 mile radius of the purchasing employer to be used by a low-income or moderate-income person who is actively employed by the purchasing employer and who is prequalified for a mortgage loan by a certified lending institution. Housing choice assistance allocations must be used within one year of the initial payment of surtax by the employer.
- Any housing assistance paid pursuant to the housing choice assistance voucher program is to be included in calculation of the percentage of the surtax revenues attributable to use for homeownership purposes.

The bill also amends s. 201.031, F.S., to require the following:

- By June 30, 2012, and every 5 years thereafter OPPAGA is to conduct a financial review of the discretionary surtax program in a levying county and provide a report to the Legislature.
- The governing body of a county implementing the surtax shall, by resolution, adopt a housing plan every three years. The housing plan must include provisions which are substantially similar to the requirements of the local housing assistance plan required in s. 420.9075(1),
- Counties levying the discretionary surtax on documents must adopt an affordable housing element to its comprehensive land use plan that complies with s. 163.3177(6)(f).
- The staff or entity with authority to implement the housing plan must prepare and submit an annual report to the governing body. The report must contain similar data to that required by the Florida Housing Finance Corporation in annual reports submitted by local governments who participate in the State Housing Initiatives Partnership program and who also implement a local housing assistance plan.

AVOIDANCE OF DOCUMENTARY STAMP TAX

Background and Current Law

Conveyances from Grantor to Wholly Owned Grantee

In 1990⁴ the legislature amended s. 201.02, F.S., to add the last two sentences of subsection (1). In response to the legislation, the Department of Revenue (DOR) amended the Florida Administrative Code⁵ (F.A.C.) to

⁴ Ch. 90-132, s.7, Laws of Florida

⁵ Fla. Admin Code Rule 12B-4.013(7)

provide that a conveyance from a shareholder to a corporation in exchange for stock is subject to the documentary stamp tax. This rule reflected the Department's interpretation of the 1990 legislation. DOR's position was later supported by a 2003 opinion of the Florida's 3rd District Court of Appeal.⁶

In 2005, the Florida Supreme Court addressed the question of whether the conveyance of property from a grantor to its wholly owned grantee was subject to Florida's documentary stamp tax in *Crescent Miami Center, LLC v. Florida Department of Revenue*⁷.

In the *Crescent* case, Crescent Real Estate Equities formed Crescent Miami Center, LLC, and then transferred 99.9 percent of its interest in Crescent Miami Center to a subsidiary limited partnership that Crescent Real Estate Equities owned. The remaining 0.1 percent interest was transferred to another limited liability company. On the same day, the latter limited liability company transferred the 0.1 percent interest to the limited partnership so that the limited partnership became the sole owner of Crescent Miami Center.

The Supreme Court held that the documentary stamp tax did not apply to the transfer of real estate to a taxpayer owned solely by the grantor. The Court found "that the transfer of property between a grantor and its wholly owned grantee, absent any exchange of value, is without consideration or a purchaser and thus not subject to the documentary stamp tax."

Effect of *Crescent* Decision

The Supreme Court's opinion eliminated documentary stamp tax on the recordation of transfers of real estate when unencumbered property is transferred to a corporate entity that is owned by the same individual or individuals, who own the property in the same ownership proportions. Examples include transfers from:

- A corporation to a wholly owned subsidiary, or from a subsidiary to its sole corporate parent;
- From the owner of single member limited liability company to the limited liability company, or from a single member limited liability company to its sole owner;
- From partners to a limited liability company in which the partners each own equal membership interests, or from a limited liability company to the partners.

The author of an article in the October 2005 issue of *The Florida Bar Journal*⁸, opined that "in certain instances, practitioners could conceivably utilize *Crescent* to avoid the application of the documentary stamp tax on future transfers of real estate. A simple example demonstrates the planning potential in this area." The Journal article then provides the following example:

Assume seller (S) and purchaser (P) have entered into a purchase and sale contract with a purchase price of \$5 million in connection with the sale of real estate. Absent any documentary stamp tax planning, the sale of the real estate would generate documentary stamp tax of \$35,000. However, the transaction could alternatively be structured as follows: 1) S contributes the real estate to a wholly owned special purpose limited liability company formed solely for the transaction (S LLC); 2) S then sells the membership interest in S LLC to P for the \$5 million purchase price; 3) P then dissolves S LLC and takes title to the real estate. S and P end up in the same exact place, except that the documentary stamp tax has been avoided.

The author's opinion is that no documentary tax is due under *Crescent* given the facts in the example. In 2007, DOR published a Technical Assistance Advisement⁹ in response to a question about the impact of *Crescent*. The Department's advisement agreed with the author's opinion that no tax is due on the recorded transfer of

⁶ *Crescent Miami Center, LLC v. Florida Department of Revenue*, 857 So.2d 904 (Fla. 2003).

⁷ *Crescent Miami Center, LLC v. Fla. Dep't of Revenue*, 903 So. 2d 913, 916 (Fla. 2005).

⁸ *Crescent—Did the Florida Supreme Court Effectively Repeal the Documentary Stamp Tax on Transfers of Real Estate?*, **Florida Bar Journal** (October 2005).

⁹ TAA No. 07B4-004.

real property where the same owner of the property owns the real property in equal proportion after the transfer and there is no mortgage or other consideration given for the land.

It appears that a significant number of real estate transactions are being structured to allow real property sales to be recorded without incurring a documentary stamp tax liability. These transactions are structured to conform to what the Supreme Court determined was not a taxable transfer in *Crescent Miami*.

Effect of the Bill

This bill provides for the taxation of some of the real estate transactions described in the "Avoidance of Documentary Stamp Tax" section of this analysis.¹⁰ The tax is imposed on the consideration paid for an ownership interest in an artificial entity when certain conditions are met. These conditions are:

- An owner or owners transfer real estate to a wholly-owned artificial entity directly, or indirectly through another intermediate entity;
- The owners' interest in the artificial entity is in the same proportion as their ownership of the real property; and
- The interest in the artificial entity is transferred within one year of the date the property was transferred to the artificial entity.

If the artificial entity owns assets other than the real property transferred to the entity by the owners, the consideration paid for the ownership interest in the entity is prorated based on the fair market value of the real property and the fair market value of the other assets. Tax is imposed on the prorated amount that relates to the real property.

The bill provides an exemption for transfers of ownership interests that are traded in security exchanges or securities markets.

B. SECTION DIRECTORY:

- Section 1.** Amends section 3 of chapter 83-220, Laws of Florida, as amended by chapter 84-270, Laws of Florida, and section 1 of chapter 89-252, Laws of Florida. Extends the authority of Miami-Dade County to assess a discretionary surtax on documents by extending the surtax sunset from October 1, 2011 to October 1, 2031.
- Section 2.** Amends s. 125.0167, F.S creates guidelines for use of surtax revenues and creates reporting requirements.
- Section 3.** Amends s. 201.02, F.S., to provide for the taxation of transfers of ownership interests in an artificial entity when real property was transferred by its owners to a wholly-owned artificial entity within one year of the transfer of the ownership interest.
- Section 4.** Amends s. 201.031, F.S. so that counties levying the discretionary surtax on documents must adopt an affordable housing element to its comprehensive land use plan
- Section 5.** Provides an effective date.

¹⁰ See pages 5-6.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill has two separate fiscal issues.

The Revenue Estimating Conference has not determined a fiscal impact for section 3. of the bill dealing with the applicability of the documentary stamp tax to transfers of ownership interests. Staff estimates that the provisions of the bill will result in additional tax revenues being received by the state.

On March 27th, 2009 the REC estimated in FY 2011-12 the extension of the Miami-Dade Surtax sunset would have a -\$8 million impact on state revenues, including a -\$3.2 million fiscal impact to General Revenue, and a -\$4.8 million fiscal impact to various trust funds. In FY 2012-13, the impact on state revenues would grow to -\$14.5 million, including a -\$6.8 million to General Revenue, and a -\$7.7 million to state trust funds.

2. Expenditures:

The bill requires a dedication of state resources by requiring financial audits by OPPAGA of surtax revenues and expenditures. OPPAGA has stated that it can perform this within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

In 1983, the Legislature enacted chapter 83-220, Laws of Florida, creating s. 125.0167, F.S., to authorize the governing body of certain counties¹¹ to levy a discretionary surtax on documents for the purpose of establishing and financing a Home Ownership Assistance Loan Trust Fund.

The extension of the sunset provision will continue the levy of the surtax in Miami-Dade County and avoid a reduction of local tax revenues beginning in 2011-12. On March 27th, 2009 the REC estimated the fiscal impact on local government due to the Miami-Dade discretionary surtax would be \$9.5 million. In FY 2012-13, the fiscal impact to local government would grow to \$17.2 million.

The Revenue Estimating Conference has not determined a fiscal impact for section 3. of the bill dealing with the applicability of the documentary stamp tax to transfers of ownership interests. Staff estimates that the provisions of the bill will result in additional tax revenues being received by Miami-dade County..

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Persons who sell and buy real estate will continue to pay the discretionary surtax on documents if assessed by Miami-Dade at a rate of 45 cents/\$100 of consideration. In addition, some of the transfers of property not subject to tax under the Department of Revenue's current administration of ch. 201, F.S., as a result of the opinion announced by the Supreme Court opinion in *Crescent*, will again be subject documentary stamp taxation under the bill.

¹¹ Counties that meet the definition of "county" in s. 125.001(1), F.S. Currently only Miami-Dade County satisfies this definition.

D. FISCAL COMMENTS:

If the Miami-Dade discretionary surtax were allowed to sunset, current local housing distributions statewide would likely be impacted. The distribution formula in s. 420.9073(1)(b), F.S., specifically excludes Miami-Dade. Therefore this would necessitate revising the formula by 2011 to include Miami-Dade in the statewide distribution formula. Miami-Dade would participate on the same basis of the rest of the state whether this would positively or negatively affect Miami-Dade's current funding levels, or if this increase in necessary funding would be offset by the 10-cent increase in state documentary stamp tax in Miami-Dade County cannot be determined.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

N/A

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On April 7, 2009 the Finance and Tax Council adopted two amendments to the bill. One amendment provided further guidance for the reallocation of Miami-Dade County surtaxes not committed at the end of a fiscal year. The other amendment changed the provisions of section 3 of the bill dealing with the applicability of the documentary stamp tax to transfers of real property to a wholly-owned artificial entity and changed the effective date. This analysis reflects the changes made by the amendments.